Supreme Court, U.S.
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No. 97-1451

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, COUNTY OF SAN BERNARDINO, CITY OF COLTON and CITY OF FONTANA,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR and JAMIE RAPPAPORT CLARK, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

CASES

Brzonkala v. Virginia Polytechnic Institute and State Univ., 132 F.3d 949 (4th Cir. 1997)..... 1

National Association of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) 3

United States v. Lopez, 514 U.S. 549 (1995) ..... passim

REGULATIONS

50 C.F.R. §§ 17.11, 17.12 2

MISCELLANEOUS

59 Fed. Reg. 5820 (1994)..... 2

U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* (1994) 2

Petitioners file this reply brief in support of their petition for certiorari in order to clarify the issues before the Court.

I. Respondents argue that this case does not warrant review because petitioners have not identified any conflict among the circuits regarding the constitutionality of the Endangered Species Act or any other federal statute. Brief for the Respondents in Opposition ("Resp. Br.") at 11-14. However, respondents miss the larger import of the petition. As this Court has recognized, the boundary between federal and state authority is critical to our system of government and must be maintained. *United States v. Lopez,* 514 U.S. 549, 557 (1995). This Court is the final arbiter of where that boundary line is located and, ultimately, the final bulwark against undue federal encroachment on the sphere of state and local authority. The confusion among the federal courts over where to draw the boundary line – confusion that is documented in the petition and abundantly demonstrated by the lower court judges in this case – cries out for intervention by this Court.[1]

Moreover, the sphere of state authority has traditionally included the areas of criminal law and land use, both of which are implicated by federal regulation of

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[1] Petitioners note that one of the decisions cited in their petition, *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 132 F.3d 949 (4th Cir. 1997), has been withdrawn. The U.S. Court of Appeals for the Fourth Circuit has now heard the case *en banc* and a decision from the court is pending.

the take of endangered species such as the Delhi Sands flower-loving fly. Over a thousand species of animals and plants are now subject to federal authority under the Endangered Species Act, *see* 50 C.F.R. §§ 17.11, 17.12, and most of these species are found on non-federal lands totaling millions of acres. *See* U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 4 (1994) (over 90 percent of listed species have some or all of their habitat on nonfederal lands); 59 Fed. Reg. 5820, 5827 (1994) (critical habitat designated for one species – the desert tortoise – includes over a million acres of private property). Thus, the proper boundary of federal authority to regulate land use based on the type of tenuous connections to interstate commerce present in this case is a question of first importance that should be decided by this Court.

II. It goes without saying that the Court's review is needed because the federal government has overstepped the bounds of its authority in this case and the lower court failed to step in, misconstruing this Court's decision in *Lopez* in the process. The respondents set forth essentially three arguments to support their assertion that the lower court was correct in its decision to uphold the assertion of federal authority in this case. None of these arguments is persuasive.

First, respondents argue that Judge Wald was correct in aggregating the effects on interstate commerce of all endangered species. Resp. Br. at 15-16. This argument has been answered effectively by the amici in support of petitioners, who point out that, under *Lopez*, aggregation is permissible only when the activity being regulated is economic in nature or is part of a larger

regulation of economic activity. Neither is true in this case. *See, e.g.*, Brief of Amici Curiae American Land Foundation and Texas Justice Foundation in Support of Petitioners at 6-9; Brief of Amici Curiae The Washington Legal Foundation and Allied Education Foundation in Support of Petitioners at 9-13.[2]

Second, the respondents appear to argue that, even if the Fly is considered on its own and not aggregated with other endangered species, the take of the Fly may still be regulated by the federal government because the Fly is purportedly an "article in commerce." Resp. Br. at 16. Respondents thereby appear to endorse the conclusion of the District Court that the take of the Fly can be regulated under Category Two of *Lopez*. This endorsement is surprising since the one point that Judge Wald, Judge Henderson and Judge Sentelle all agreed on was that this is not a Category Two case. *See* 130 F.3d at 1046 and 1062.[3]

Finally, the respondents argue that federal authority to regulate the taking of an endangered species is clear where the taking is incidental to commercial activity. As amici have convincingly demonstrated, this is a classic

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[2] Such aggregation of impacts is critical to the resolution of most challenges concerning the extent of federal authority under the Commerce Clause. Given that the Court did not have occasion in *Lopez* to address in detail the circumstances under which aggregation is appropriate, the Court's guidance on this issue is urgently needed.

[3] Respondents also appear to rely on the purported ability of Congress to regulate activities under the Commerce Clause based on the potential for future commerce. Judge Henderson and Judge Sentelle effectively disposed of this argument below. *See* 130 F.3d at 1058 and 1064.

case of putting the cart before the horse. *See, e.g.*, Brief Amicus Curiae of the American Farm Bureau Federation and California Farm Bureau Federation in Support of the Petition for a Writ of Certiorari at 8-10. A regulation cannot be justified on Commerce Clause grounds by looking to the effects on interstate commerce of the regulation itself, but rather must be justified by the interstate commerce impacts of the activity in the absence of the regulation.

CONCLUSION

Viewed in isolation, as the respondents would have this Court do, it may be hard for those not directly affected to get excited over a decision by the Fish and Wildlife Service which prohibits interfering with a few square miles of land which form the habitat of an endangered species. However, when viewed in terms of the reach of the Commerce Clause, it becomes clear that this case presents a major constitutional issue. The federal Endangered Species Act represents a laudable attempt to further a substantial governmental interest but the desire to do good is no substitute for the authority to do so.

This Court in *Lopez*, citing and quoting from earlier cases, made it clear that the original understanding and intent of the founding fathers – that the federal government is one of enumerated powers – are as true today as they were 200 years ago. This case provides the Court with a perfect opportunity to instruct the lower federal courts that even a law valid on its face may be beyond the power of Congress when it is applied in a particular setting. It provides a perfect opportunity to give federal judges the guidance they so desperately need precisely because the opinions of both the Court of

Appeals and the District Court show that the lower federal courts understand neither the letter nor the spirit of this Court's opinion in *Lopez*.

It is, in short, a cert-worthy case.

Respectfully submitted,

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